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No. 94-1874

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JANE PORTER-COOPER,

Petitioner,

v.

DALKON SHIELD CLAIMANTS TRUST,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

HARVEY L. KAPLAN
(Counsel of Record)
SCOTT W. SAYLER
SHOOK, HARDY & BACON
1200 Main Street
27th Floor
Kansas City, Missouri 64105
(816) 474-6550

Attorneys for Respondent
Dalkon Shield Claimants Trust

Washington, D.C. • THIEL PRESS • (202) 328-3280

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Eighth Circuit, in a unanimous *per curiam* opinion, correctly held that the trial court's determination of the disputed trial issues and exclusion of irrelevant evidence was not an abuse of discretion and was, at the very most, harmless error?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Dalkon Shield Claimants Trust ("the Trust") respectfully submits this Brief in Opposition to Petitioner Jane Porter-Cooper's Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit ("Eighth Circuit").

OPINIONS AND ORDERS BELOW

The Eighth Circuit's January 9, 1995 *per curiam* opinion is reported as 49 F.3d 1285 (8th Cir. 1995), and reproduced in Petitioner's Appendix ("Pet. App.") at p. A-2. The Eighth Circuit's February 14, 1995 Order denying rehearing is unreported and reproduced in Pet. App., p. A-8.

The March 17, 1994 Order of the United States District Court for the Eastern District of Missouri, denying new trial and other post-trial relief, is unreported and reproduced in Pet. App., p. A-6. The district court's August 12, 1993 Order narrowing the factual issues and expediting the trial is unreported and reproduced in Pet. App., p. A-7.

STATUTES AND MISCELLANEOUS PROVISIONS INVOLVED

AMENDED ADMINISTRATIVE ORDER NO. 1 GOVERNING DALKON SHIELD ARBITRATION AND LITIGATION, NO. 85-01307-R, AT 2 ¶9 (E.D. VA. JULY 1, 1991):

> No Claimant shall seek, directly or indirectly, or be awarded damages in the nature of trebled, exemplary, punitive or similar damages, or attorneys' fees in any Arbitration or Litigation.

FED. R. CIV. P. 16(C)(1):

> At any [pretrial conference] consideration may be given, and the court may take appropriate action, with respect to the formulation and simplification of the issues, including the elimination of frivolous claims or defenses.

FED. R. CIV. P. 61:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

STATEMENT OF THE CASE

Petitioner Jane Porter-Cooper ("petitioner") filed this products liability case against the Trust pursuant to 28 U.S.C. 1332(a)(1), claiming that she sustained injuries as a result of her use of the Dalkon Shield intrauterine contraceptive device.[1]

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[1]The Trust did not manufacture or sell the Dalkon Shield. The A.H. Robins Company ("Robins") manufactured and sold the Dalkon Shield in the United States from January 1971 until June 1974, when the company suspended domestic distribution and sale of the product. Subsequently, thousands of lawsuits were brought against Robins by women who claimed injuries from use of the Dalkon Shield. Robins, in 1985, filed a petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Virginia (the "Virginia Court").

The Trust was established under Robins' Sixth Amended and Restated Plan of Reorganization ("the Plan"), confirmed by the Virginia Court on July 26, 1988. *In re A.H. Robins Co.*, 88 B.R. 742 (Bankr. E.D. Va. 1988). The cornerstone of the Plan is the provision for a trust fund to process the Dalkon Shield Claims perfected by filings with the bankruptcy clerk. Consummation of the Plan occurred in December 1989, when all appeals relating to

[footnote continued]

In August 1993, petitioner tried the case to a jury, arguing that two Dalkon Shields used between 1971 and 1976 caused her to sustain pelvic inflammatory disease ("PID"). She further maintained that, as a result of PID, she underwent a July 1976 hysterectomy that left her involuntarily infertile. The Trust contended that petitioner's pelvic infections were caused by exposure to sexually transmitted organisms. The Trust, maintaining that petitioner's hysterectomy was elective surgery, further contended that damages should be limited even if the Dalkon Shields used by petitioner were found to have caused her PID. The jury found for petitioner and awarded $20,000 in damages.

Petitioner appealed, and a unanimous Eighth Circuit panel[2] rejected her contention that the trial court had violated her right to trial by jury when it determined the disputed trial issues and excluded certain evidence. *Porter-Cooper v. Dalkon Shield Claimants Trust*, 49 F.3d 1285 (8th Cir. 1995) (Pet. App., pp. A-2 to A-5).

The Eighth Circuit concluded that the district court order limiting the trial to medical causation and damages[3] was consistent with Fed. R. Civ. P. 16(c)(1). (Pet.

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the Plan were concluded and the Trust was fully funded upon the finalization of the Plan-mandated merger of Robins and American Home Products. The Trust's chief purpose is to fully, fairly, and efficiently resolve each individual Dalkon Shield claim.

[2]The Eighth Circuit panel included Chief Judge Richard S. Arnold; Circuit Judge Theodore McMillian; and Senior Circuit Judge for the Fifth Circuit, Thomas M. Reavley (sitting by designation).

[3]Prior to trial, the Trust filed a Motion in Limine to Narrow Factual Issues and Expedite Trial. In its Motion, the Trust offered to withdraw its statute of limitations defense and relieve plaintiff of the burden of proving a tort. (Pet. App., p. A-3). In addition, the Trust asked that the trial evidence be limited to the issues of causation and damages. (*Id.*). The district court granted the Motion. (Pet. App., p. A-7).

App., p. A-4). The Eighth Circuit then reviewed the excluded exhibits, which petitioner claimed would have bolstered her proof of causation.[4] The Eighth Circuit held that any error in excluding the exhibits was harmless because the jury had resolved causation in petitioner's favor. (*Id.*). Finally, pursuant to Fed. R. Civ. P. 61 (harmless errors disregarded) and Fed. R. Evid. 103 (offers of proof required), the Eighth Circuit upheld the exclusion of certain expert testimony. (*Id.* at A-4, A-5).

THE WRIT SHOULD BE DENIED

I.

AS RECOGNIZED BY THE EIGHTH CIRCUIT, THE DISTRICT COURT'S EVIDENTIARY RULINGS DID NOT CREATE A CONSTITUTIONAL ISSUE INVOLVING PETITIONER'S SEVENTH AMENDMENT RIGHT TO TRIAL BY JURY.

This Court should deny the Petition for a Writ of Certiorari because, despite petitioner's contentions, this case does not raise constitutional issues.[5] No constitu-

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[4] Petitioner wanted to use the exhibits to tell the "Dalkon Shield History." (Pet. App., p. A-4). The exhibits consisted of lawyer-prepared chronologies of events and were allegedly based upon Robins' documents. (*Id.*).

[5] In addition to incorrectly suggesting that this case raises constitutional questions, petitioner has made other misstatements of law and fact. *See* Sup. Ct. R. 15.1 (instructing respondents to call attention to misstatements that bear upon the question of what issues would be before the Court if certiorari were granted). First, petitioner claims that Robins "learned that its Dalkon Shield caused PID by carrying infectious fluids into the uterus." (Petition ("Pet."), p. 4). This is a misstatement. Second, petitioner misstates that the Trust answered the Complaint with a "general denial of all allegations." (Pet., p. 5). The Trust did not file a general denial. *See* Answer in *Porter-Cooper v. Dalkon Shield Claimants Trust*, No. 85-0614-C-A (E.D. Mo. filed July 21, 1992).

tional issues were raised in the district court. The district court simply granted a motion in limine and, in so doing, established the disputed trial issues. Thereafter, the district court excluded irrelevant evidence. Indeed, the Eighth Circuit explicitly found it unnecessary to address any alleged constitutional violations in the process of deciding this appeal. (Pet. App., p. A-4). Petitioner's request for a Writ of Certiorari should be denied.

Petitioner contends that the district court rulings constitute constitutional violations. Specifically, petitioner contends that she was denied her Seventh Amendment right to jury trial, despite a four-day trial that ended with a verdict in her favor. Petitioner, as she did in the court below, has grossly mischaracterized the case.

The Eighth Circuit, aware that petitioner was "*couching* her argument as a denial of her constitutional right to trial by jury," did not address that or any other constitutional issue because it recognized that there were no constitutional issues in the case. (Pet. App., p. A-4 (emphasis added)). Petitioner received a jury trial and a verdict in her favor. The Petition for a Writ of Certiorari should be denied.

II.

THE EIGHTH CIRCUIT CORRECTLY HELD THAT THE TRIAL COURT'S DETERMINATION OF THE DISPUTED TRIAL ISSUES AND EXCLUSION OF IRRELEVANT EVIDENCE WAS NOT AN ABUSE OF DISCRETION AND WAS, AT THE VERY MOST, HARMLESS ERROR.

The Eighth Circuit correctly ruled that the district court did not commit trial error and that, in any event, the alleged errors were harmless. By entering the pretrial order which limited the trial evidence to medical

causation and damages, the district court simply established the disputed trial issues. District courts are empowered to take appropriate action with respect to the "formulation" of issues during the pre-trial phase. *See* Fed. R. Civ. P. 16(c)(1).

> The reference in Rule 16(c)(1) to 'formulation' is intended to clarify and confirm the court's power to identify the litigable issues. It has been added in the hope of promoting efficiency and conserving judicial resources by identifying the real issues prior to trial, thereby saving time and expense for everyone.

Fed. R. Civ. P. 16(c)(1) advisory committee's note.[6] Given that petitioner was prohibited from recovering punitive or similar damages in the case,[7] entry of the

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[6]The authority to enter orders that have the effect of restricting the evidence to contested issues is supported by the case law. *See, e.g., FDIC v. Glickman,* 450 F.2d 416, 419 (9th Cir. 1971) ("A district judge is given broad discretion in supervising the pretrial phase of litigation, with a view toward sifting the issues in order that the suit will go to trial only on the questions involving honest disputes of fact or law."); *Pepsico, Inc. v. Continental Casualty Co.*, 640 F. Supp. 656, 665 (S.D.N.Y. 1986) (the court, after completion of pre-trial proceedings, may "make an order limiting the issues to be tried, as contemplated by Rule 16(c)(1) Fed. R. Civ. P."); *Balla v. Idaho State Bd. of Corrections*, 595 F. Supp. 1558, 1561 (D. Idaho 1984) (court, pursuant to Rule 16(c)(1), "ordered that it would entertain evidence only upon" certain constitutional deprivations and, thereafter, set forth the "factually disputed issues" in a pretrial order); 11 C. Wright & A. Miller, *Federal Practice and Procedure* §1525 at 242 (1973) (pursuant to Rule 16(c)(1), the court is "directed to define the issues, facts, and theories actually in contention, which means that extraneous issues should be weeded out.").

[7]*See* Amended Administrative Order No. 1 Governing Dalkon Shield Arbitration and Litigation, No. 85-01307-R, at 2 ¶9 (E.D. Va. July 1, 1991), *reproduced in* Respondent's Appendix ("Resp. App."), pp. 1a-7a ("No Claimant shall seek, directly or indirectly, or be awarded damages in the nature of trebled, exemplary, punitive or similar damages, or attorneys' fees in any Arbitration or Litigation.").

pre-trial order was a proper exercise of judicial discretion.[8]

The Eighth Circuit also recognized that it was unnecessary to determine whether petitioner's lawyer-prepared "Dalkon Shield History" exhibits were improperly excluded at trial. Petitioner argued that such exhibits were probative on the causation issue. (Pet. App., p. A-4). Because causation was ultimately resolved in petitioner's favor,[9] any error in excluding the exhibits was harmless. *See* Fed. R. Civ. P. 61 (errors disregarded unless they affect parties' "substantial rights"). The harmless error doctrine also applies to the exclusion of Drs. Shanna Swan and Richard Sweet, both of whom would have offered causation testimony on petitioner's behalf.[10] (Pet. App., p. A-4).

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[8]The Trust, given the punitive damages prohibition and its willingness to drop the limitations defense, argued that any evidence of Robins' conduct, state of mind, or knowledge regarding the Dalkon Shield--in other words, evidence relating directly to the issues of punitive damages and accrual of petitioner's cause of action--should be excluded as irrelevant to the contested issues in the case. On appeal, the Eighth Circuit agreed that the timing and extent of Robins' knowledge of Dalkon Shield problems was not relevant. (Pet. App., p. A-4).

[9]That causation was resolved in petitioner's favor cannot be doubted. Jury Instruction No. 10 provided: "Your verdict must be for plaintiff if you believe that plaintiff was damaged as a direct result of her use of the Dalkon Shield." Appellant's Appendix ("Appt's Appx") at 42, *filed in Porter-Cooper v. Dalkon Shield Claimants Trust*, No. 94-1887 (8th Cir. filed May 31, 1994). The jury returned a verdict in favor of plaintiff-petitioner and awarded $20,000 in damages.

[10]Petitioner maintained that Dr. Sweet would have offered damages testimony as well. (Pet. App., p. A-4). The Eighth Circuit held that petitioner failed to make an adequate offer of proof. (Pet. App., pp. A-4, A-5). Petitioner does not challenge that ruling.

In this case, the harmless error doctrine presents itself as an *independent* justification for upholding the district court's evidentiary exclusions. Indeed, were the Court to grant the writ, the harmless error doctrine would likely keep the Court from reaching any substantive point. Because the decision below could be upheld without deciding the question presented in the Petition, the writ should be denied.

CONCLUSION

For all the reasons set forth above, Petitioner Jane Porter-Cooper's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

HARVEY L. KAPLAN
(Counsel of Record)
SCOTT W. SAYLER
SHOOK, HARDY & BACON
1200 Main Street
27th Floor
Kansas City, Missouri 64105
(816) 474-6550
Attorneys for Respondent
Dalkon Shield Claimants Trust.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

Chapter 11

No. 85-01307-R

RETAIN PROCEEDING
(Judge Merhige)

In re:

A.H. ROBINS COMPANY, INCORPORATED,

Debtor.

EMPLOYER'S TAX IDENTIFICATION
No. 54-0486348

AMENDED ADMINISTRATIVE ORDER NUMBER 1 GOVERNING DALKON SHIELD ARBITRATION AND LITIGATION

For the reasons stated in the Memorandum filed in this cause on June 26, 1991, and having ascertained that the Order accompanying said Memorandum contained typographical errors and omissions, it is Adjudged and Ordered that said Order of June 26, 1991, shall be and is of no force or effect and that the instant Order is substituted therefore.

For the reasons stated in the Memorandum filed in this cause on June 26, 1991, and in accord with the Plan of Reorganization in this cause, deeming it proper so to do, it is ADJUDGED AND ORDERED as follows:

1. Every holder of a Dalkon Shield Personal Injury Claim and every person (including counsel) commencing binding arbitration or commencing or recommencing litigation of a Dalkon Shield Personal Injury Claim under Section E.5 of the Claims Resolution Facility shall be bound by this Order. (Such holders, persons and counsel are referred to herein as "Claimant"; such arbitrations and litigations are referred to herein as "Arbitration" and "Litigation";) Every Arbitration arbitrator shall likewise be bound by this Order.

2. No Claimant shall commence Arbitration or shall commence or recommence Litigation until this Court has certified by entry of an order, upon the application of the Trust, that: (i) the claims review process respecting the applicable Dalkon Shield Personal Injury Claim has been completed in accordance with the Claims Resolution Facility ("CRF"), and (ii) as a matter of law, where a Claimant intends to proceed with such Arbitration or Litigation in a venue outside the United States, the venue is appropriate and the courts of such venue and jurisdiction will honor and enforce (whether by reason of the Claimant's stipulation or otherwise) this Order and the Plan. Such certification may be revoked upon a subsequent showing that the procedures of the CRF were purposefully or materially circumvented, or that the certification was otherwise improvidently granted, in which event the applicable Arbitration or Litigation may be ordered dismissed or stayed by this Court.

3. This Court retains jurisdiction as provided by Section 8.05 of the Plan, and by applicable law, including exclusive jurisdiction as against any Arbitration or Litigation:

a. to resolve controversies and disputes regarding interpretation and implementation of the Plan, the

Trust Agreements, the CRF, the releases obtained by the Trusts (or either of them), any amendments of the Trust Agreements, and in accordance with the provisions of the CRF, any disputes relating to whether or not a timely and proper notice of claim was filed, the rights of holders of Late Claims and whether a Disallowed Claim should be reinstated;

b. to enter orders in aid of the Plan, the Trust Agreements, the CRF and releases obtained by the Trusts (or either of them), including, but not limited to, appropriate orders (which may include contempt or other sanctions) to protect the Debtor, the Successor Corporation, AHP, any of the Affiliates thereof and other Persons from actions prohibited under Article VIII of the Plan;

c. to modify the Plan pursuant to Section 9.06 of the Plan; and

d. over actions challenging the validity and enforceability of the releases and injunctions referred to in Sections 8.03 and 8.04 of the Plan.

4. The Trust shall maintain a document depository in Richmond, Virginia, containing substantially all documents which the Trust, using its best efforts, has identified as having been produced without qualification by Robins in pre-petition Dalkon Shield personal injury tort litigation. Upon reasonable written notice to the Trust, a Claimant may visit the depository at any time during working hours and will have full access to all documents and videotapes located there. A copying service will be located on or near the depository premises where copies of any document or videotape may be made at the Claimant's request and expense.

5. In addition to maintenance of the document depository described in Paragraph 4, the Trust shall, upon request, provide to a Claimant who has properly

elected Arbitration or Litigation, free of charge, the catalog that indexes materials and documents used in previous Dalkon Shield personal injury tort litigation and which was developed and compiled by the law firm formerly known as Robins, Zelle, Larson & Kaplan, with the cooperation of other attorneys throughout the country, and which was distributed by the Minnesota Trial Lawyers Association. The Claimant may obtain, at the Claimant's expense, any materials and documents from this catalog by placing an order for them directly with the copying service which maintains these catalogued materials and documents.

6. No discovery by a Claimant against any person or entity shall be conducted in connection with any Arbitration or Litigation except:

a. as provided in Paragraphs 4 and 5 above;

b. discovery against persons or entities, including doctors, hospitals and other health care providers, not a party to the Arbitration or Litigation but excluding Robins, AHP, the Successor Corporation, Aetna, any of their respective Affiliates and any of their present or former officers, directors, employees, attorneys, agents, or representatives;

c. discovery against the Trust solely through the use of interrogatories and requests for admissions which shall be limited to issues related to individual Dalkon Shield Personal Injury Claims and which shall not include issues of Trust administration, provided, however, that discovery shall be permitted against persons identified by the Trust as expert witnesses to be called by the Trust in the respective Arbitration or Litigation;

d. as provided by the rules developed by the Trust respecting Arbitration; and

e. as further ordered by this Court upon request of the Claimant.

All discovery disputes arising in Arbitration or Litigation may be resolved by this Court.

7. No Arbitration or Litigation shall be filed or proceed against any person or entity other than the Trust except as provided in Section 8.04 of the Plan respecting Unreleased Claims. No claim alleged to be an Unreleased Claim shall be asserted against any person or entity absent an order by this Court finding that such claim satisfies the provisions of Section 1.85 of the Plan.

8. Following the entry of the certification order described in Paragraph 2 above, service of process on the Trust in the respective Arbitration or Litigation may be made by certified U.S. first-class mail, return receipt requested to Linda J. Thomason, Counsel, Dalkon Shield Claimants Trust, P.O. Box 1314, Richmond, Virginia 23210. Service by this means shall be effective upon receipt by the Trust.

9. No Claimant shall seek, directly or indirectly, or be awarded damages in the nature of trebled, exemplary, punitive or similar damages, or attorneys' fees in any Arbitration or Litigation.

10. Any Claimant commencing Arbitration or commencing or recommencing Litigation shall forthwith:

a. conform all pleadings to the terms of this Order by substituting the Trust as the defendant, by deleting or dismissing all other defendants and respondents (except insofar as an order has been obtained pursuant to Paragraph 7 above, respecting an Unreleased Claim), by deleting or dismissing any claim for punitive damages and by taking all other necessary action; and

b. file this Order and the certification order described in Paragraph 2 above with the Arbitration arbitrator or Litigation court as exhibits to, and incor-

porated in, the initial pleadings commencing Arbitration or commencing or recommencing Litigation.

11. This Court may stay or order the parties to seek a stay of any Arbitration or Litigation upon a showing by the Trust (i) of undue prejudice due to the multiplicity of ongoing, pending or scheduled trials or arbitration hearings or (ii) that an Arbitration or a Litigation is proceeding in violation of this Order, in contravention of this Court's jurisdiction or in violation of the Plan.

12. The Trust, any Claimant, any arbitrator involved in, and any award resulting from, an Arbitration shall comply with the rules developed by the Trust respecting Arbitration, Judicial review, if any, of an Arbitration or an Arbitration award shall be, in the first instance, by this Court.

13. No levy against the Trustees, the Trust or its assets may be made as a result of any Arbitration or Litigation. Until further order of this Court, in order to assure the continued availability of funds to pay all valid Dalkon Shield Personal Injury Claims and in order to further the other proper purposes of the Plan, Trust and CRF, in satisfaciton of all awards or judgments (including awards or judgments of costs, fees or disbursements) obtained as a result of Arbitration or Litigation, the Trust shall:

a. pay initially only that portion of such an award or judgment which does not exceed the greater of $10,000.00 or the final settlement offer made by the Trust upon Option 3, Section E.4 of the CRF; and

b. after the payment in full of all valid, timely Dalkon Shield Personal Injury Claims which are settled under Options 1 or 2 or under Option 3, Sections E.1-4 of the CRF, or at such time as the Trustees are satisifed that all valid, timely Dalkon Shield Personal Injury Claims can be fully paid, next pay pro rata

from any Trust assets available for that purpose the unpaid balances of all Arbitration awards and Litigation judgments.

14. The Trust shall give notice by mail of the entry of this Order, accompanied by a signed copy of the Order, to all claimants holding timely or late-filed Dalkon Shield Personal Injury Claims or to their counsel, as reflected by the records of the Trust.

15. A Claimant who desires relief from this Order shall file an appropriate motion in this Court stating the particular circumstances warranting such relief.

DATE: July 1, 1991
nunc pro tunc
June 26, 1991

/s/ Robert R. Merhige, Jr.
ROBERT R. MERHIGE, JR.
UNITED STATES DISTRICT JUDGE

/s/ Blackwell N. Shelly
BLACKWELL N. SHELLY, per R.R.M.
UNITED STATES BANKRUPTCY JUDGE